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FRANCHISE GRANTED BY MUNICIPALITY TO A PUBLIC SERVICE COMPANY AS BEING CONTRACTUAL IN NATURE.

A recent decision by the Missouri Public Service Commission deals with the question of the power of that Commission to increase fares allowed to be charged by a street railway company of St. Louis beyond those specified in a franchise granted by municipal ordinance, under the Missouri Constitution. St. Louis was empowered to require as a condition of its consent to the use of its streets, that a public service company should agree to charge rates specified by ordinance. By a majority of three to two the commission held that there was no surrender of the State's power of regulation by the Constitutional grant of power to the municipality. Re United States Railways Co., P. U. R. 1918, B. 815.

This question, in its last analysis, is governed by the Federal Constitution and by the clause particularly relating to the impairment of the obligation of contracts. In many cases by the Supreme Court it has been held, especially where there is question of the surrender of the State's right to regulate public service companies, that there is no conclusive right of contract that may not be impaired where ordinances of a city condition rights in the use of its streets by a public service company, unless the legislature or the state constitution clearly authorizes such as a contractual right. Collier on Public Service Companies, pages 178 to 181, 512, 601.

In a very recent case by U. S. Supreme Court it was said: "Assuming (what is not clear) that the provision in the franchise ordinances respecting the rates of fare and the transfer privilege is contractual in form, still it is well settled that a municipality cannot, by a contract of this nature, foreclose the exercise of police power of the State, unless clearly authorized to do so by the supreme legislative power." Puget Sound Traction, L. & P. Co. v. Reynolds, 244 U. S. 574, 37 Sup. Ct. 705, 61 L. Ed. 1825, P. U. R. 1917, F. 57.

This class of holdings have all been made on a theory independent of any reservations in constitutions as to the right of alteration of charters to corporations, to exclude which it has been ruled there must be "such clear and unmistakable language, that it cannot be reasonably construed consistently with the reservation of the power of the State." Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174; Sutton v. New Jersey, 244 U. S. 258. Collier on Public Service Companies, § 90.

In Puget Sound Traction case a city ordinance provided for a rate by a street railway not exceeding 5 cents with transfers and for commutation tickets at 4 cents. It also provided for reasonable rules and regulations, except that these must not be in "conflict with the laws of the State of Washington and the charter and ordinances of the city." There was no express condition stated regarding the railway charging fares.

The opinion referred to the view of Washington Supreme Court that "contractual provisions in franchises conferred by municipal corporations without express legislative authority are subject to be set aside by the exercise of the sovereign power of the State," and it approved that view. The opinion also distinguished this ruling from the case of Detroit United R. Co. v. Michigan, 242 U. S. 238, "where the State legislature had expressly provided that the municipal corporation might make a binding agreement with a street railway respecting the rates of fare."

Looking at the facts in this case it is to be observed that the court said that original village and township grants were contractual in their nature, and recipients of such grants and their successors were in-

corporated under a street railway act, which provided that no consent for the construction of a railway could be given "until the company shall have accepted in writing the terms and conditions upon which it is permitted to use the streets."

Further it was provided that no consent previously given shall "be revoked or the company deprived of the rights and privileges conferred." Also it was provided that "the rates of toll or fare to be charged by the company are to be established by agreement between it and the corporate authorities and are not to be increased without consent of such authorities."

After referring to Detroit v. Detroit Citizens Street R. Co., 184 U. S. 368, it was said it was there pointed out "that the legislature regarded the fixing of the rate of fare as a subject for agreement between the municipality and the company. And the terms of the several ordinances are such as clearly to import a purpose to contract under the legislative authority thus conferred."

In the principal case the minority of the Commission rely upon a provision of Missouri Constitution which reads that: "No law shall be passed by the general assembly granting the right to construct and operate a street railroad within any city, town or village or on any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by such street railroad, and the franchise so granted shall not be transferred without similar assent first obtained." Mo. Const., Art. 12, § 20.

Does such a constitutional provision imply a legislative grant to a city, town, village, or other local authority to exact of a street railway contractual arrangements in regard to what it shall charge for its service to the public? On the other hand, such provision might be construed to mean, that, regarding a street railway as an obstruction to travel on streets or highways and local authorities being bound to keep them free from obstruction, the question whether under existing conditions obstruction should or not be permitted, is left to the judgment of the local authorities. If this satisfies the purpose of the provision, then there is no grant to the local authorities of contractual rights, and according to the U. S. Supreme Court there must be a clearly authorized grant of contractual power or the grant fails in this regard.

The all-wide vesting of the right of consent—not in a particular city or village, but, generally, in local authorities—seems far from conferring contractual power. It rather seems the conferring on local tribunals the right of veto against obstruction of highways over which they have superintendence. And it seems to us that, if this power of superintendence were not exercised in sound discretion its findings could be set aside by some appropriate tribunal.

We do not treat this question according to any rulings in Missouri courts, because, as said, the question is one rather of federal law in respect to impairment of obligation of contracts. As said by U. S. Supreme Court in Detroit U. R. v. Michigan *supra* that "notwithstanding our disposition to lean towards concurrence with the view of the State court of last resort in a matter of this nature, we are unable to accept its construction of the ordinances of 1889." There the judgment was reversed and the ordinances were held contractual in their nature, but the principle is the same. We think that State law in that case very clearly provided for contractual arrangements, but it seems otherwise so far as the Missouri Constitution is concerned.

It may be said, in conclusion, that the purpose in chartering public service companies is to serve the public and it ought to require specific grant of authority for a subordinate department in a State to interfere with them, or even with the general public's rights to demand service from

an unincorporated public utility upon reasonable request and for reasonable compensation. These subordinate departments themselves only operate under plainly conferred powers.

NOTES OF IMPORTANT DECISIONS.

DECEIT—ACTION AGAINST FATHER FOR MISREPRESENTING AGE OF MINOR CHILD.—In Stryk v. Munchowicz, 167 N. W. 246, decided by Wisconsin Supreme Court, it was held, by a majority, that the rule that a minor, suffering injury while engaged in an employment forbidden by law to be engaged in, cannot be barred of recovery or subjected to any counterclaim for damages, by any misrepresentation as to his age, does not apply to a father or other third person misrepresenting the employe's age, the employment being made in reliance on such misrepresentation.

The rule regarding misrepresentation by the minor was held to be, that public policy forbids the minor from dispensing with the statute, but this does not operate in favor of the father of the child.

A dissent by two judges is, that the rule as established is devitalized—its potency, in effect, taken away—by permitting action against the father of the child for loss recovered by the latter, by the employer relying on misrepresentation by the father as to the age of the child.

The majority proceeded on the theory that a right of action arises out of misrepresentation relied on by one to his injury, though the misrepresentation causes the one relying thereon to commit a criminal act merely *malum prohibitum*, in this case the employment of a minor of non-employable age.

The dissenting opinion contends, that if public policy is invaded by allowing an employer to plead in bar or by counterclaim against the minor himself, so also should such policy prevent employer from doing, in effect, these things against the minor's parent, who controls the minor in the bringing or not bringing of his action. While it may be true that the minor practically might be thus barred of his right, yet this is only an incidental and not a direct effect, and it presumes that because the parent injures an employer, by this token he also would injure his child. This presumption cannot be indulged. The principle referred to by the majority does not need for its operation that another should have the benefit it confers.

CORPORATIONS—LIABILITY OF DIRECTOR FOR NEGLECT OF DUTY.—In Kavanaugh v. Gould, et al., 119 N. E. 237, decided by New York Court of Appeals, it was held that where a director was chosen upon an arrangement that he was not to attend meetings nor to take any active part in the management of the affairs of a trust company, it, nevertheless, is a question of fact whether losses from mismanagement by its active officers is attributable to the non-performance of their statutory duties and they be held liable therefor to stockholders.

As a fact the defendant Gould never attended the meetings of directors, nor acquainted himself with the business or methods of the company. The opinion shows gross abuses in the making of loans without adequate security, sometimes by resolution of the board, again by direction of the president, who acted without check or hindrance by the board and in matters not known to, but which ought by diligence to have been known by, such board.

It was said: "We do not say as matter of law that the defendant Gould was negligent, or that his negligence caused the above losses, but we do say that it is a question of fact, whether as a director he should have known by the July 22 meeting (at which he was not present) something of the company's affairs and the transactions and methods of its president, and whether, upon the evidence and under the conditions above stated he should have, in the exercise of reasonable care, done something to prevent the continuance of such methods and further loans on the shipbuilding bonds without a check or supervision."

These shipbuilding bonds appear to have been loaned upon by the president and kept secret, but any sort of supervision over his acts would have exposed the transaction. The loan appeared to be largely a gamble disastrous to the company. The court laid down the principle that: "No custom or practice can make a directorship a mere position of honor devoid of responsibility or cause a name to become a substitute for care and attention. The personnel of a directorate may give confidence and attract custom; it must also afford protection." The holding by the court was unanimous.

DEMOCRACY UNDER CONSTITUTIONAL LIMITATIONS.*

Our democracy is fighting a common battle with yours for the preservation of Christian civilization; our soldiers are side by side with your gallant men, with the Australians and New Zealanders, forcing back the sullen barbarians from the devastated soil of France and Belgium. Our political leaders are at one with yours in the fine determination that this war shall be fought out until the whole world is purged of German treachery, and that outlaw among nations is made to pay the penalty for its crimes.

When peace comes, we shall look out upon a changed world. Reverence for the past will have lost its force with multitudes; respect for authority has already been undermined by the continual appeals of half-educated demagogues. The danger most to be feared is that in seeking reformation for acknowledged defects in democratic institutions, our English-speaking peoples may fall in to the heresies which made of the French revolution the preparation for despotism and in our day has brought the Russian people to the brink of anarchy.

Under the awful stress of this unprecedented war the duty of the patriotic citizen is clear. With a full persuasion of the value of the checks and balances necessary for the preservation of free government, every effort must be directed towards winning the war. Failure to do so will leave us at the mercy of a ruthless power, which looks upon might as the only test of right —a power which invokes the Deity not as incarnated in the crucified Saviour, but in the war gods of the Vikings.

When the war is won, what are we to say to the vast mass of jealousy and discontent which has been bred in the very heart of our social system? We must recognize the fact that democracy's direst foes are in her own household. If the fair promise of the past century of effort to teach men the art of self-government is to be turned into disappointment, it will be because we are not able to educate the masses into an appreciation of the necessity of self-control and self-renunciation.

No student of English history can fail to note running through the centuries the influence of the ideal of law for the protection of the inalienable rights of the individual. Beginning with the Magna Charta in the reign of King John, it has been developed through all the struggles between arbitrary prerogative and parlimentary resistance until now the British Constitution, although unwritten, is a buttress against any form of invasion of the right to life, liberty and property. No human institution has ever been perfect, and in the sphere of political government, history seems to be one long record of failure and imperfection. But it is, as we believe, the peculiar glory of English-speaking men that they have more nearly solved the problem of insuring to the masses the great object of all law—the protection of the citizen so long as he observes the general precepts upon which it is based, summed up in the classic definition of Justinian that he should

"Live honorably, hurt nobody, and render to every one his due."

In the United States we have been taught to believe that no form of government has been developed with more prescient wisdom than that which is embodied in our national Constitution. While it seemed to be "struck off," to use Gladstone's words, by the "brain and purpose" of the gifted men who assembled in Philadelphia in 1787 to suggest to the people of the confederation of states some remedy for the obviously impossible system which endured as a makeshift until independence was secured, its genesis lay centuries back in the contests which overthrew the pretensions of the

*This very thoughtful article is a revision of an address delivered by the President of the American Bar Association before the Ontario Bar Association and is full of suggestion and hope for such a time as this when unprecedented changes are taking place in all avenues of human endeavor and are threatening even the most stable institutions of society.—A. H. R.

royal prerogatives in England. Nor need it be denied that out of the speculations of radical philosophers of the 18th century in France, some grains of wheat were separated from much pernicious chaff, to find root in the minds of the fathers of our Republic. But, unlike the dreamers and mockers who undermined the edifice of French royalty, the American statesmen were men of constructive genius, who well knew where the limitations between popular rights and popular powers should be drawn.

Without exaggeration, and making every allowance for the defects that have become apparent as the years have passed, it cannot be doubted that never has so large a body of people been gathered under any political system with an equal distribution of wealth or so high an average of morality, using the word in its widest signification. While the immigrant population in the great cities, especially in New York, has grown too rapidly to be assimilated, until recent years there has been no formidable effort to dispute the generally accepted belief among the body of American citizens that our governmental system, with its written constitutions, state and Federal, based upon the three-fold distribution of functions, the legislative, the executive and the judicial, has solved the political problem. An ultra provincial school has insisted that what has done so well in America would do equally well in other countries. But the more perspicuous thinker has recognized how much the success of our scheme of government has come from peculiar conditions that can never be repeated. The land was new and but thinly peopled by nomads. It was rich in every bounty of nature, and the early settlers were free from inherited inequalities of rank and fortune and vested interests, which must be reckoned with in ancient countries. If the theory of democracy was ever to be worked out successfully, here was the God-given opportunity. It has worked out so far. Liberty regulated by law has pervaded among a greater population and over a greater region than has ever before been dominated by one people. The only comparison history affords is with the Roman Empire from Augustus until the barbarian invasion brought about its dismemberment. But, as we know, while peace reigned within the borders of that mighty power, liberty and self-government were dead. Nor was it until Constantine made Christianity the state religion that moral influences asserted themselves in arresting the all but universal decay of civilization. As the moral power of Christianity saved the ancient civilization from total destruction, taming the passions of its conquerors and making them accept and develop all that was good in it, so it has been due to the same power that the ideal of individual liberty has been preserved and developed in the modern world. Inadequately as modern nations have practiced the doctrines which Christians profess, they have at least assumed to follow them, and civilization has advanced just in proportion as those doctrines have been carried into effect. Rarely has a Macchiavelli or a Frederick openly advocated a frank departure from Christian principles.

A fundamental precept of Christianity is the equality of human souls in the presence of their Creator. Although the infidel philosophers of the 18th century rejected all supernatural sanction, such natural virtues as they possessed influenced their speculations to an appreciation of some of the consequences of this truth. Their advocacy of a pure democracy has merit accordingly. It is beside the purpose to show how the dreams of liberty, equality, fraternity failed of realization when tested by the grim realities of human passion, and how mankind, preferring security in fact to the illusion of liberty, took refuge in reaction. The fathers of our Republic knew how to draw wisdom from the lessons of history. The fruit of their labors was a constitution resting upon the consent of the governed, but stabilized against emotional change.

As there is nothing static in human affairs and each age presents new tests, our

American statesmen are confronted with the necessity of justifying principles which were once considered axiomatic. They reach to every aspect of governmental affairs. The common sense of justice, slowly aroused, finally acquires irresistible force. Before the stress of war, with its insistent demands for action, had aroused the people, there were symptoms of discontent demanding change and obtaining it. We have tried to cure the evils, or supposed evils, of our system, by resorting to a more popular participation in actual government. The adoption of the initiative, the referendum and the recall are especially significant. It remains to be seen whether they will be of good or evil effect. It requires but a glance at the working of government, whether Federal, state or municipal, to see that it has not been because of any limitation on the power of the electorate that the system has failed where failure has come, but because of the indifference and inertia of a great proportion of electors. No political system which presupposes the intelligent interest of an educated body of citizens can be effective if the first postulate is faulty. It is in the highest degree unfortunate that so many well-intentioned leaders of public opinion believe that legislation which is not in itself the outcome of popular habit and opinion can prove effective.

Our statute books are full of laws which are dead letters, and necessarily so, because they run counter to this principle. The present session of Congress exhibits the spectacle of a proposed amendment to the Constitution enfranchising women, which is a new evidence that both political parties are ignoring the old theory of non-interference with state concerns. While, if the prohibition amendment now pending is carried, it will be a surrender to the central government of jurisdiction in matters hitherto deemed primarily of local import, without precedent in the history of the Republic.

Perhaps it may safely be said that all forms of government are the result of evolution. We may agree with the advanced thinkers who recognize that in and of itself there is nothing sacred in any form, save as it is an evidence of adherence to the eternal rule of order. But certainly reverence is due to the fruit of the wisdom of ages of experience, and customs hoary with antiquity are not lightly to be laid aside. Measured by events, more tests have been applied to the constitutional system of the United States in the one hundred and thirty-eight years of its existence than to that of China in a millennium. It is a matter of concern, therefore, not alone to Americans, but to all lovers of mankind, that any strongly organized body of discontented people should seek to revolutionize that system, whether the movement be traced to the self-confident superficial demagogue of an early established stock or to the imported heresies that have come with German immigrants. It is with us and must be reckoned with. It finds the most congenial soil in the minds of those who feel that injustice is done in the distribution of wealth directly produced by labor. Many are restive under the administration of a law which guarantees the right of property. Of recent years this feeling has become crystallized in opposition to the courts. Various provisions have been forced into state constitutions to curtail their power. Their right to interpret the constitutions, national and state, and to declare void legislation where it offends against constitutional limitations, has been violently assailed as usurpation. While for the moment the strenuous efforts of the legal profession have checked and restrained the agitation for a change which would result in practical revolution and destroy a judicial power unique among modern political constitutions, the popular discontent has left its traces. In Ohio, for instance, the new Constitution, Article IV, Section 11, provides that the concurrence of all but one of the judges is a requisite before any law can be declared unconstitutional, except in the affirmance of judgments of the court of appeals. In other states, the principle of judicial recall has been adopted.

That eminent publicist, David Jayne Hill, seeking an explanation for the failure, "the weakness, the disappointment, the perfect disillusionment of the Hague Conference," believes that it is to be found

"in the fact of the veto—the possibility that after many months of conference and thought and labor * * * one or two powers could disappoint the issue and prevent anything being done," and "the conspicuous reason why so many nations are reluctant to have matters of importance adjudicated by a neutral court is that there is no law on the subject, and we do not like to subject great issues to the mere private opinions or individual judgment of men; and we shall have to proceed first by laying down broad principes of a constitutional nature, which are prohibitive as well as creative of legislative powers, and then proceed to certain specific and definite acts of international legislation which we can never attain except on the principle of majorities." (Proceedings of the American Society of International Law, 1917, page 82.)

Mr. Hill is of opinion that the willingness of the American people to submit to majority rule is because it is exercised within the limits of constitutional protection. These immunities are secured as the first step in advance. He says justly:

"The problem of democracy was never solved until it was solved in this country—first in our state constitutions and then in our Federal Constitution. But this kind of democracy is fit to spread over the whole world, wherever there is a reasonable degree of intelligence, and it is the only kind of government, except some form of despotism, that can be trusted with the destinies of mankind." (*Ibid.*, page 83.)

In reply to the obvious inquiry as to the working of the British Constitution without express limitations on the power of the majority, Dr. Hill says with great force:

"There are many traditions with respect to power in the English Government, and there are conservative institutions which are characteristic of the English people and of the English character, which cannot be found anywhere else, and while a parlimentary democracy may work very well in England * * * there is no assurance that it is capable of universal application, * * * and that is the ground of difference between this complex and highly diversified nation—the melting pot of all the nations of the earth—and a race like the insular English race or the self-governing colonists that have gone out of England." (*Ibid.*, page 84.)

A distinguished justice of your own Supreme Court, William Remick Riddell, whose recently published book on the Constitution of Canada contains a chapter giving a comparative estimate of the governmental systems of the United States and the Dominion concludes that

"The great and overshadowing difference between the United States and Canada consists in the written constitution of the former, limiting and defining legislative powers, *i. e.*, what are called constitutional limitations."

He asks:

"And does all this not show that the fathers of the Union had not confidence in the wisdom and justice of the people—the electorate? They were not content to leave to the existing or to future generations the power to act contrary to what they, these fathers, thought just and right. If it was not, 'No doubt but ye are the people and wisdom shall die with you,' was it not perilously near to it?

"The result is that the people of the United States of America are governed in part indeed by the legislators elected by themselves, but in no small measure by the hand and voice of the dead.

"This is the essence of what is so often made a boast, namely: That its government is a government of law and not of men. Wherever there is a written constitution limiting the powers of legislative and executive bodies, there must of necessity be a judicial body to interpret the meaning of the constitution; there must of necessity be a tribunal to determine the meaning of the document in case of dispute. That tribunal could not well be the legislative or the executive itself, but it must be a separate tribunal and can only be a court."

The learned justice then passes in review some of the leading constitutional decisions of the American courts and con-

trasts them with those of the Dominion courts in similar cases. All going to show that

"The government of the United States can claim no powers which are not granted by the Constitution. It is a government of enumerated powers. The Dominion of Canada has all the powers not granted to the Provinces.

"In the United States the courts are supreme. In Canada the people rule through their representatives; in the one country a few men say to the legislative bodies, 'Thus far shalt thou go and no further;' in the other the legislative bodies say to the courts, 'Thus far and thus shalt thou go and no further or otherwise.'" (The Constitution of Canada, pages 141, 145.)

The reproach leveled at the fathers of the Constitution of the United States, and those who seek to maintain it unimpaired, is a lack of confidence in the people. Is not this unjustified? The same body which created the Constitution can amend and has amended it. In the long run, all powers of government are granted by the people and may be resumed by them. A fear of emotional legislation was certainly warranted by a generation which heard the visionary teachings of Rousseau and the mocking cynicism of Voltaire. Its conservatism was justified by the orgies of the French revolution which followed within a lustrum the deliberations of the Philadelphia Convention. It is not accurate to say that

"Half a dozen men sitting up in a quiet chamber can paralyze the activity of a Senate and a House, may say that a measure imperatively called for in the public interest cannot be validly enacted; and the legislators and people are helpless."

Those half dozen men dare not, under their oaths, expound any law but that which is binding upon them as upon all branches of the government and the whole body of the citizens. Every objection which has been raised against the theory and practice of government under the Constitution of the United States would seem to have been foreseen and dealt with by the convention which framed it and the gifted men who persuaded the states to adopt it.

"The interpretation of the laws," says Hamilton, "is the proper and peculiar province of the courts. A constitution is in fact, and must be regarded by the judges as a fundamental law. It, therefore, belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.

"If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

The assumption that a written constitution is a dead hand laid upon coming generations by that which adopted it, and, therefore, is undemocratic, falls when it is remembered that provision always exists for change by the regular methods of amendment. If the people, in adopting such an instrument, foresaw from the history of mankind that self-imposed restrictions are of the essence of good government, both for the individual and for the nation, they would be derelict in not imposing them. Whatever be the theoretical arguments in favor of unrestricted and immediate power in the hands of the numerical majority of a comparatively small homogeneous people, the history of the United States shows that the checks and balances of a written constitution have worked well with them. With every allowance for the imperfections of which thoughtful Americans are painfully aware in their political government, especially that of muncipalities, it may be safely maintained that it is not in the direction of an unrestricted democracy, but in a greater care in observing existing constitutional requirements that the remedy is to be found. While we may heartily agree with Justice Riddell in accepting the aphorism, "It is not so much the form of a constitution as the spirit in which government is carried on, not so much the law as the men

who administer it which count," we may not abate our admiration for the prescience of the draftsmen of our Constitution and for their handiwork; for whatever the future may have in store for the American people, under the protection of their Federal and state constitutions, they have enjoyed hitherto a measure of rational freedom unequaled by so large a community in the history of mankind.

After all, in the vexed questions of political government, as in all other human affairs, the tree must be judged by its fruit. True it is that the goodly heritage of the American people was a virgin continent whose wealth they have exploited, but have shared with a generous hand with all who were willing to cast their lot with them. True it is that the inevitable selfishness of human nature, the decay of religious faith and the ills inseparable from prosperity have prepared the ground for the enemies of self-restricted democracy to sow the seeds of discontent and irreverence for tradition. The un-American doctrines of the schools of Marx and Lassalle and their followers have made serious progress among the immigrants in our republic, foreign in race and temper to the feelings and aspirations inherited by the American people from the motherland of the early settlers. When the open savagery of the attack which is now made upon our nation and upon all democratic nations has been defeated, we and they will have to grapple with the more dangerous conspiracies within, and especially with those directed against our constitutional system. The murmurings against the judicial power, the violence of which has been abated for the time, are but symptoms of the assault to be made all along the line against the limitations upon majority opinion.

For years we have been treated to disquisitions on the thoroughness and efficiency of the German polity. Our collegiate schools of economy and sociology have been the effective means of carrying on propaganda in favor of German methods in all departments of civic life. We have imported professors from German universities and sent our clever young men to sit at the feet of their faculties in their home land. For more than a generation the careless, wasteful administration in America has been contrasted with German efficiency, until we were ready to believe that the more our entire polity was Germanized, the nearer we should come to the ideal perfection. Since August, 1914, we have been undergoing a process of disillusionment. While the magnificent organization of the imperial army has been demonstrated, it has none the less been found possible for the hastily improvised levies of the British Empire, rallying upon the superb armies of France and Belgium and Italy, to hold in check the mighty columns that represent the study of Moltke, Bismarck and their successors during fifty years. The German sea power dares to assert itself only in the submarine method of assassination. It needs but a little time and patience to prove that, after all, the idol of German naval and military efficiency has feet of clay.

When we turn to the workings of German methods in social life, we find the falsity of the claim of superiority of the boasted kultur compared with conditions of democratic nations. Recent studies of "The League for National Unity" are of vital significance. They show how pernicious has been the effect of the German propaganda in weakening the respect and loyalty of other peoples for their own country, by spreading the fiction that the welfare of the common people is the prime consideration of the German government, while in point of fact all its legislation is based upon the theory of strengthening the ruling aristocracy, who are to all intents and purposes a feudal class. It is suggested that the belief in German benevolence towards the working classes, taught in New York to Russian exiles, has had much to do with the attitude of the Bolsheviki leaders towards Germany, with its recent disastrous

results. Far from being benevolent towards the working masses, it would seem from a review of the League's tracts that Karl Liebnecht told the truth when he wrote in 1916:

"Nor does this conclusion by any means suppose the superiority of the judicial to the legislative power; it only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statute, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental." (The Federalist, No. 78.)

It appears that the feudal system still obtains in the land laws, and the peasant farmers are compelled to pay off feudal dues in addition to taxation. They must submit to stringent laws of registration, and the educational system is so devised that, generation after generation, the child is educated so that he will remain in the station of life in which he was born.

Wages are small; the greater part of the farm work is done by women. Even in peace times the agricultural population is underfed and overworked. Travelers will bear out the report of the British Board of Trade in 1908, based upon the reports of burgomasters, German boards and trade unions, that

"The German government, in its social and historical composition, is an instrument of oppression and exploitation of the working masses. It serves the interest of junkerdom, of capitalism and of imperialism, both at home and abroad."

"In rural Germany everywhere women take their place in the field and farm yard, in the work of the forest and garden, and in any German town she may be seen drawing along the streets little carts with wood and other wares. In Bavaria, however, women work alongside of men in callings still more onerous They act as hod-bearers; they break huge stones with heavy hammers on the site of building operations; they chop faggots in the streets for housholders and carry heavy loads on wooden racks suspended from their shoulders; and in Munich a considerable part of the work of street cleaning is done by women, who are paid two shillings apiece for a long day's exertion."

It is well said by the Committee who have prepared the notes referred to:

"The fiction is that the farmer and worker are indulgently protected by governmental schemes, such as sick insurance, old age insurance and insurance against accidents. The fact is that these very measures, which in effect do not even reach the value of poorhouse relief, are helping to drive the farmer into further indigency."

As with the farmer, so with all classes of labor. The same weary story of exploitation and oppression is told. Overcrowding, lack of sanitary and hygienic care, excessive infant mortality, all contradict the glowing accounts upon which the world has been fed for many years. After reading the statistics, we cannot resist the Committee's conclusion that Germany's social progress is a sham which has deceived her own people and bade fair to deceive the world, while in point of fact all her benevolent laws "were but so many adroit agencies to enchain the people to its Divine right militarist system."

They have been successful in fixing upon the people the habit of looking to the government for everything, while they were sacrificed for the aggrandizement of aristocracy.

With much that is undoubtedly good in recent social legislation in America patterned upon that which was first tried in Germany, notably the Workmen's Compensation Act, it may be doubted whether it is not mixed with evil. Our democratic system will be changed into a vast bureaucracy if the body of the people are led to look to the government, state and Federal, to correct the inequalities that are the necessary consequence of competition. We have gone a long way from the practice of the earlier days. The gradual transference to Federal control of the railways and other public service enterprises threatens the

principle of local self-government. While the emergency of a great war has made it necessary to put well nigh dictatorial power in the hands of the Executive branch of the government, it must be limited strictly to abnormal conditions, or we shall pass insensibly into a socialized paternalistic system—the very antithesis of real democracy.

Lawyers as a class have been accused, with much color of truth, of ultra conservatism. Too often they have opposed measures of reform threatening vested interests; but among people of English stock, and especially in the United States, their guidance has been of the utmost value to the commonwealth. They have exercised the controlling influence in our legislatures; and where their passionless methods in dealing with great questions have been disregarded, the consequences have been ill.

Nor have they failed in bringing about reform. Under the steady pressure of our professional organizations, both state and Federal, archaic methods of administering justice have gradually yielded to simplicity. The cause of uniformity in commercial law has been greatly advanced and there is a spirit of social service in the profession which is continually gaining strength. It is not by chance that our Federal Constitution, drawn at a time when our population was three millions, hemmed in between the Atlantic Ocean and the Allegheny Mountains, has served essentially unchanged as a sufficiently flexible charter of government for a hundred millions, who have made conquest of the vast empire that stretches from ocean to ocean. Under Providence, it is because the legal profession on the bench and at the bar, in the office of the country attorney, and in the halls of legislation, have applied to each social and political problem as it arose the principles of justice embodied in the English law. Of course, the artificial rules of the feudal system have required modifying legislation, and the great body of mercantile law has been adapted and absorbed. Changes in the habits of life, brought about by scientific appliance of the hidden forces of nature, have come with a suddenness that might well have required new adjustments. And yet, in the main, the simple rules of justice between man and man and between man and the state, as outlined by the precedents of the English courts, have been adequate for our needs.

Taught by the lessons of the past, a spirit of conservatism, not blind to the necessity for gradual change where conditions require it, should always mark the attitude of our profession.

WALTER GEORGE SMITH.

Philadelphia, Pa.

CRIMINAL LAW—PLACE OF HOLDING COURT.

MELL v. STATE.

Supreme Court of Arkansas, March 11, 1918.

202 S. W. 33.

In prosecution for assault with intent to rape, it was error for the court, at the request of the prosecuting attorney, to adjourn to a hotel for the purpose of taking testimony of prosecuting witness, who was ill, and subsequently, after returning to the courthouse, to readjourn to the hotel to take testimony in rebuttal, against defendant's objection.

HART, J. C. W. Mell prosecutes this appeal to reverse a judgment of conviction against him for the crime of assault with intent to rape. His punishment was fixed by the jury at a term of three years in the state penitentiary, and the evidence adduced for the state was sufficient to warrant the verdict. On the other hand, the testimony of the defendant exonerated him from the charge.

The record shows that the prosecuting attorney at the beginning of the trial asked that the court be adjourned to a hotel situated in the town near the courthouse for the purpose of taking testimony of the prosecuting witness. This request was granted by the court against the objections of the defendant. The court and the jury over the objections of the defendant went to the hotel and took the testimony of the prosecuting witness, and then

returned to the courthouse for the purpose of conducting the trial. After the defendant had concluded his testimony, the prosecuting attorney again asked the court to adjourn to the hotel for the purpose of taking the testimony of the prosecuting witness in rebuttal. This was granted against the objection of the defendant. The prosecuting attorney made the request in each instance on the ground that the prosecuting witness was too ill to leave the hotel and come to the courthouse and give her testimony there. In several jurisdictions where the question has been raised it has been held, unless prohibited by statute, the trial court may in its discretion adjourn court to the home of a witness to take his testimony where the witness is unable to attend the trial at the courthouse. Davis v. Commonwealth (Ky.) 121 S. W. 429, and Selleck v. Janesville, 100 Wis. 157, 75 N. W. 975, 41 L. R. A. 563, 69 Am. St. Rep. 906. On the other hand, it has been held to be reversible error to adjourn the trial of a criminal case to the home of a witness against the objection of the defendant. Bishop's New Criminal Procedure (2d Ed.) vol. 2, § 1195. Adams v. State, 19 Tex. App. 1; Carter v. State, 100 Miss. 342, 56 South. 454, Ann. Cas. 1914 A, 369; Funk v. Carroll County, 96 Iowa, 158, 64 N. W. 768. We think the trend of our decisions is toward the latter rule. In Dunn v. State, 2 Ark. 229, 35 Am. Dec. 54, the court said:

"The common law defines a court to be a 'place where justice is judicially administered,' and therefore to constitute a court there must be a place appointed by law for the administration of justice, and some person authorized by law to administer justice at that place, must be there for that purpose. Then, but not otherwise, there is a court, and the judicial power of the state may be there exercised by the judge or person authorized by law to hold it; and if the law prescribed no time for holding the court, the judge might lawfully hold it when, and as often, as he chose. So, likewise, if the place was left to his election, instead of being fixed and prescribed by law, he might lawfully sit in judgment, where he pleased, within the territorial limits prescribed to his jurisdiction, but in this state both the time and place of holding the terms of the circuit court in each country are prescribed by law."

The court has recognized that in cases of emergency such as the destruction of the courthouse by fire the court itself may secure other quarters in the county seat for temporary use in the administration of justice. Hudspeth v. State, 55 Ark. 323, 18 S. W. 183; Lee v. State, 56 Ark. 4, 19 S. W. 16. In the case of Williams v. Reutzel, 60 Ark. 155, 29 S. W. 374, it is said that the object of the rule seems to be to obtain certainty and to prevent a failure of justice through the parties concerned or affected not knowing the place of holding court. The manifold mischiefs that might arise from permitting a court to assume a migratory character and travel from place to place in the same locality or even in the same town are manifest. It is apparent that courts are held to determine the rights of all who are properly brought before them, and that numerous cases are pending in the same court at the same time. It would detract from the majesty of the law, lessen the dignity of courts, and cause trouble and injustice to litigants if the courts should be held at any other time or place than that provided by law. It follows, therefore, that the court erred in adjourning to the hotel to take the testimony of the prosecuting witness against the objection of the defendant.

Error is assigned because the court refused to allow the defendant to introduce testimony tending to show the insanity of the mother and sister of the prosecuting witness. There was no error in the ruling of the court. It is contended that the evidence was competent on the question of the credibility of the witness. No objection was made to the mental competency of the prosecuting witness when she testified, and no question was then raised as to her mental condition. To have permitted the defendant at the trial to have introduced evidence to prove the insanity of her mother and sister would have been collateral to the issue to be tried before the jury, and that was the guilt or innocence of the defendant.

Inasmuch as the judgment must be reversed and the cause remanded for a new trial, we will declare the law applicable to the admission of evidence relating to the mental condition of the prosecuting witness. In the District of Columbia v. Armes, 107 U. S. 519, 2 Sup. Ct. 840, 27 L. Ed. 618, the court said:

"The general rule, therefore, is that a lunatic or a person affected with insanity is admissible as a witness if he have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue; and whether he have that understanding is a question to be determined by the court, upon examination of the party himself, and any competent witnesses who can speak to the nature and extent of his insanity."

It is not contended by the defendant that the prosecuting witness was mentally incompetent to testify in the case. His contention was that she was subject to insane delusions at times, and it was admissible in order to affect her credibility as a witness and to ex-

plain her conduct to prove this fact by witnesses who had personal knowledge of her condition of mind or mental delusions as well as by her acts and conduct on the occasion in question. Wharton's Criminal Evidence (10th Ed.) vol. 1, § 370, A, B; Underhill on Criminal Evidence (2d Ed.) 203; 1 Wigmore on Evidence, §§ 492-497. See, also, People v. Enright, 256 Ill. 221, 99 N. E. 936, Ann. Cas. 1913E, 318, and note, and State v. Simes, 12 Idaho, 310, 85 Pac. 914, 9 Ann. Cas. 1216.

For the error indicated in the opinion, the judgment will be reversed, and the cause remanded for a new trial.

NOTE.—*Adjourning Court to the Home of a Witness in Criminal Case.*—The case of Selleck v. Janesville, 100 Wis. 157, 75 N. W. 975, 41 L. R. A. 563, 69 Am. St. Rep. 906, was a civil suit and the opinion was not unanimous, and it was said that the taking of testimony was somewhat similar to a view of the premises, which was thought to be within the discretion of the trial judge, and it was said: "While we may not be willing to go to the extent of some courts in upholding trials and adjudications had outside of the court house, yet the authorities are ample to support the proposition that the taking of the plaintiff's testimony in the manner indicated did not deprive the court of jurisdiction, nor nullify the judgment, but was at most an irregularity." There are several cases cited to this, one of them appearing to be a criminal case. State v. Peyton, 32 Mo. App. 522. This, however, was not in fact a criminal case but was *scire facias* on a bond forfeiture.

In a criminal case it is said there is a constitutional guaranty that persons accused of crime are entitled to a public trial, and this implies that it is to take place in open court at a place of holding court. O'Brien v. People, 17 Colo. 561.

In Carter v. State, 100 Miss. 342, 56 So. 454, Ann. Cas. 1914 A, 369, the situation was greatly like that in the instant case, and where objection was made to the taking of testimony of a sick witness, ill at her home. It was thought to be a reversible irregularity to do this.

An Iowa civil case held, that where a place for holding court is appointed and there is a regular court house, a court loses its jurisdiction to adjourn to a private house for the purpose of a trial. It was said that: "The danger to result from permitting the court, in the trial of a cause, at the instance of a party, against the objections of the other, to leave the place provided by law for the trial and go to another place is very manifest." Funk v. Carroll County, 96 Ia. 158, 64 N. W. 768. But an elder Iowa case said it was not improper even in a criminal trial held prior to the enactment of a statute providing that "courts must be at the place provided by law" for the court, jury and counsel to adjourn to a neighboring house to receive the testimony of a witness, if the prisoner was not put to substantial inconvenience. Hampton v. U. S., Morris 489.

And in State v. Tracy, 34 N. D. 498, 158 N. W. 1069, a criminal action, it was held that to take testimony, in a rape case at a hospital, situated at the country seat where the law recognizes that conditions may arise where the court room provided by law may prove inadequate and the court may direct other quarters at the expense of the county, and the law also permits the jury to be taken from the court room to the place where an offense has been committed so that the jury may view such place, a court may in its discretion authorize testimony of a witness to be taken elsewhere, if no prejudice is shown to have resulted.

In People v. McWeeney, 259 Ill. 161, 102 N. E. 233, an order for injunction was held void because it was entered at an "armory;" since courts are not migratory and can only exercise their functions in the places appointed by law.

In Reed v. State, 147 Ind. 41, 46 N. E. 135, it was held that, where in a case of emergency steps are taken before a special judge in a room in the court house other than the court room, this was not error, where it did not appear in the case that the court was not regularly in session, with proper notice of the place of its sitting and with full opportunity for interested persons to be present.

A question such as is here considered does not necessarily pertain to jurisdiction, and, while a public trial involves trial at some recognized place as a court, yet there is no necessary inference of harm, where a court is vested with some discretion in an emergency. C.

HUMOR OF THE LAW.

A Circuit Court Judge of Pennsylvania was systematically affronted by a lawyer, a political opponent. A friend asked him:

"Why don't you squelch the fellow? He needs it."

"Well," said the Judge, musingly, "up in my home town there's an ugly yaller dog that, whenever there is moonlight, sits on the stoop and howls until the town can't sleep, and generally keeps it up till daylight." Then he resumed his dinner. The friend in amazement inquired, "Well, what of it?"

"Well," said the Judge, slowly, "the moon keeps right on."—Christian Register.

This is a jury room secret that has come into circulation in some mysterious way:

"Look here," said one of the jurymen, after they had retired, "if I understand aright, the plaintiff doesn't ask damages for blighted affections or anything of that sort, but only wants to get back what he's spent on presents, pleasure trips and so forth."

"That is so," agreed the foreman.

"Well, then, I vote we don't give him a penny," said the other, hastily. "If all the fun he had with that girl didn't cover the amount he expended it must be his own fault. Gentlemen, I courted that girl once myself!"

WEEKLY DIGEST

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1. **Adverse Possession**—Emancipated Slave.—The possession of a slave holding land as the beneficiary of a trust did not become adverse on emancipation, but to make possession adverse it would have been necessary to disavow the trust, leave the place, and re-enter, claiming adverse possession.—Shaw v. Ward, N. C., 95 S. E. 164.

2. **Assault and Battery**—Arrest Without Warrant.—A person is not authorized to assault an officer upon his mere statement that he has a warrant for such person's arrest, and that he must consider himself under arrest, but the officer must make some physical attempt to make an unlawful arrest before such person can lawfully resist by force.—Harris v. State, Ga., 95 S. E. 268.

3. **Attachment**—Levy.—Although part of chattels was not physically removed, where sheriff read writ of attachment to defendants and instructed their employes that they were keeping possession for him, there was sufficient levy to create lien as against mortgagee of property described as being at different place.—Lee County Sav. Bank v. Snodgrass Bros., Iowa, 166 N. W. 680.

4. **Attorney and Client**—Authority of Attorney.—Even if attorney accepted principal, interest, and costs on a fi. fa. based upon judgment on a note, and agreed with maker not to collect attorney's fees provided for therein, such agreement would raise no presumption that attorney was authorized by client to make such settlement.—Evans v. Atlantic Nat. Bank of Jacksonville, Fla., Ga., 95 S. E. 219.

5.——Imputable Knowledge.—Where attorneys were employed to ascertain whether there were suits pending affecting title to certain land, information acquired by such attorneys through examining court records is imputed to client.—Bunnell v. Holmes, Col., 171 Pac. 365.

6. **Bailment**—Gratuitous Bailee.—A gratuitous bailee, who is sent money for a certain purpose with written instructions, must be presumed to have acquiesced and consented to the written instructions, where he did not disavow the terms under which sent.—Bradford-Kennedy Co. v. Buchanan, Wash., 171 Pac. 228.

7. **Bankruptcy**—Illegal Agreement.—Agreement between two creditors to bid against each other at bankruptcy sale until certain figure was reached in order to induce other bids, and, if no higher bids were received, to buy property for their joint account and divide any profits, held not invalid.—Schaap v. Robinson, Ark., 201 S. W. 292.

8.——Renouncing Interest.—Where ownership of corporate stock, apart from any interest in land conveyed by corporation as appurtenant to stock, would be of no benefit to trustee in bankruptcy, and land could not be reached, trustee should renounce any interest which he might be entitled to assert against stock by virtue of contract by bankrupt and his wife for acquisition of stock and land.—In re Berry, U. S. D. C., 247 Fed. 700.

9. **Banks and Banking**—Negligence.—Acts of officers of bank with capital of only $50,000 in lending $30,000 to a canning company in which they had stock, which had a capital of $10,000, and which continually operated at a loss, though they believed it would ultimately pay a profit, were so reckless as to constitute negligence for which they were liable to shareholders.—Magale v. Fomby, Ark., 201 S. W. 278.

10. **Bills and Notes**—Acceleration of Debt.—Provision in a mortgage, securing a note payable two years after date that on default in any interest the whole should become payable related alone to a foreclosure, and did not accelerate time of payment of note, and action on note after first default was prematurely brought.—Alwood v. Harrison, Okla., 171 Pac. 325.

11.——Attorney Fees.—Where note provides for the payment by the maker of principal, interest, and attorney's fees, the attorney's fees are a part of the principal debt.—Evans v. Atlantic Nat. Bank of Jacksonville, Fla., Ga., 95 S. E. 219.

12.——Bad Faith.—If indorsee had actual knowledge when he took note that place of payment had been changed, or knowledge of such facts that his action in taking instrument amounted to bad faith, under Rev. St. 1909, § 10026, he is not "holder in due course."—Mechanics' American Nat. Bank v. Helmbacher, Mo., 201 S. W. 382.

13.——Negotiability.—Instrument signed by bank reciting deposit by one named "payable

to the order of himself," with interest at 6 per cent if left 12 months, was negotiable, the quoted words being words of negotiability.—Chandler v. Smith, Ga., 95 S. E. 223.

14.——Purchase Money.—That note stated that it was part of purchase money for a dredge, title to which was to remain in payee, would not be notice to purchaser that consideration had, or would fail, where dredge was not delivered until four months later—Harty v. Keokuk Sav. Bank, Tex., 201 S. W. 419.

15. **Brokers** — Contract.—Defendant owner was not bound to accept from plaintiff broker a customer at a price less than that stipulated, although he was at liberty to accept a less price from another customer.—Mullen v. Crawford, Iowa, 166 N. W. 694.

16.——Producing Buyer.—Where real estate agent places his principal in touch with purchaser and thereafter principal terminates agency and completes sale to such purchaser, agent may recover his commission.—Johnson v. Columbia Mortgage & Trust Co., Mo., 201 S. W. 365.

17. **Carriers of Goods**—Bill of Lading.—When bank in good faith makes advances, whether as purchaser or lender, and receives bill of lading as security, its claim upon property covered by bill of lading is good as against claim of creditors of shipper.—Painesville Nat. Bank of Painesville, Ohio, v. Hannan, Col., 171 Pac. 364.

18.——Custody of Law.—A carrier is not responsible for goods taken from its custody by valid legal process, provided it gives the owner prompt notice of the suit, so that he may have an opportunity to protect his interest.—Morgan v. Chicago & N. W. Ry. Co., Wis., 166 N. W. 777.

19. **Carriers of Live Stock**—Special Service.—That a station agent after telegraphing told a shipper that a train arriving during the night would carry his cattle did not constitute a contract for special service and a discrimination in violation of the Elkins Act.—Chicago, R. I. & P. Ry. Co. v. Stallings, Ark., 201 S. W. 294.

20. **Carriers of Passengers** — Employes.—Where attitude of railroad company towards employes riding on railroad's gasoline speeders on their private business was, at most, one of permission, it was not liable to employe so riding, injured by defect in speeder, on theory of his being passenger.—Glover v. Chicago, M. & St. P. Ry. Co., Mont., 171 Pac. 278.

21.——Misinformation.—Misinformation given by defendant railroad's agent that plaintiff's train would stop at their destination, resulting in failure of relative to meet them at nearby station when they alighted pursuant to their original plan, and then advised relative they would proceed to ultimate destination without his company, establishes no cause of action.—Hutchison v. Southern Ry. Co., S. C., 95 S. E. 181.

22.——Relation of Passenger.—Plaintiff who was injured by opening of front door of pay-as-you-enter street car while passing by such door to enter car at rear door, held not a passenger at time of injury.—Murray v. Cumberland County Power & Light Co., Me., 103 Atl. 66.

23. **Chattel Mortgages**—Bill of Sale.—Written bill of sale and contemporaneous agreement to retransfer the property on the seller's payment of the consideration were in effect a chattel mortgage and not a pledge, under which either party by agreement might have possession.—Keppler v. Kelly, Tex., 201 S. W. 447.

24.——Description of Property.—A mortgage, describing property as "live stock," including steers, cows, etc., would cover horses and mules, though not enumerated.—Lee County Sav. Bank, v. Snodgrass Bros., Iowa, 166 N. W. 680.

25. **Commerce**—Interstate Traffic.—Conductor of work train unloading ties to repair track used for interstate traffic is employed in interstate traffic under federal Employers' Liability Act, although at the time of the accident he was not engaged in distributing ties, but was returning from work in charge of such train.—Eley v. Chicago Great Western R. Co., Iowa, 166 N. W. 739.

26. **Constitutional Law**—Equal Protection.—Gen. St. Fla. 1906, § 2218, providing for the allowance of attorney's fees to plaintiff in suits to enforce mechanics' liens, held unconstitutional, as denying to defendants in such suits the equal protection of the laws.—Union Terminal Co. v. Turner Const. Co., U. S. C. C. A., 247 Fed. 727.

27.——Legislative Intent.—Where the intent of the Legislature is plain, it is immaterial that a taxation statute is unfair, where there is no claim that it is so unfairly discriminating as to be unconstitutional.—Great Western Accident Ins. Co. v. Martin, Iowa, 166 N. W. 705.

28. **Contracts**—Attorney Fees.—Where contract for sale of grain, with receipt for advancements, provided for attorney's fees but there was subsequent verbal agreement, which did not provide for attorney's fees, and receipt was satisfied by subsequent transactions between parties, holder could not recover attorney's fees, though maker still owed him money on account.—Born v. Union Elevator Co., Ind., 118 N. E. 973.

29.——Evidence.—Where party denied making contract to do specific amount of dye work, but stated that he only agreed to do best he could on account of scarcity of dye, evidence concerning amount of dye he had on hand was admissible as explanatory circumstance.—Ess-Arr Knitting Mill v. Fischer, Md., 103 Atl. 91.

30. **Corporations**—Acceptance of Stock.—Corporate stock purchased from funds of partnership to knowledge of such corporation taken in one partner's name made him "holder" under a provision that "holder" could retire stock in exchange for products of corporation, and it could not be compelled to accept such stock for products sold partnership.—National Sewer Pipe Co. v. Smith-Jaycox Lumber Co., Iowa, 166 N. W. 708.

31.——Election of Officers.—Where stock was assigned to assignee as collateral for assignor's note, assignee could surrender certificate and receive certificate in own name, on which he might vote stock at corporation elections under by-law limiting voting right to those in whose names stock stood on the books.—Hardman v. Barrow, Ga., 95 S. E. 209.

32.——Ratification.—Where person held out by a corporation as its manager employed plaintiff,

who deposited $500 for privilege of earning commissions and as a fund to pay his wages, at $20 per week and commissions, for 6 months to sell automobiles for the corporation, which opened an account and accepted the benefits of the contract, it ratified it, and was liable to plaintiff for the balance of the deposit, on his wrongful discharge after 11 weeks.—Bertholf v. Fisk, Iowa, 166 N. W. 713.

33. **Covenants**—Mutual Mistake.—Where lots not owned by grantor were included in the deed by mutual mistakes, there was no breach of covenants of warranty and seisin.—Maxwell v. Wayne Nat. Bank, N. C., 95 S. E. 147.

34. **Dedication**—Street Plat.—Plat presented by owner of land to common council of city, duly acknowledged, and representing strip of land named as street running east and west across owner's land, was plat of street within meaning of Burns' Ann. St. 1914, § 8900.—Interstate Iron & Steel Co. v. City of East Chicago, Ind., 118 N. E. 958.

35. **Deeds**—Description of Land.—Deed of land of which S. O. died possessed, lying on waters of the Little South fork of Cumberland river in W. county, containing 365 acres, was sufficiently definite to pass title.—Foster v. Roberts, Ky., 201 S. W. 334.

36.——Exception and Reservation.—Where deed divided farm between owners in common, a provision that grantor should have half income from gravel in certain lots held exception, and not reservation, in view of fact that the income had previously been divided equally between owners, and that gravel deposit constituted enterprise distinct from that of farming.—Worcester v. Smith, Me., 103 Atl. 65.

37.——Sufficiency of Writing.—A writing signed and sealed by the parties styled, "Memorandum of Agreement," containing the words, "It is further agreed that the said Price will convey to the said Peyton all the mining rights and privileges of his land," is not a deed of conveyance, but only an executory contract to convey.—State v. Morris, W. Va., 95 S. E. 197.

38.——Undivided Interest.—Deed conveying part of a survey, and containing 640 acres more or less, being a one-half undivided interest out of the survey, held to convey an undivided one-half interest in the survey and not any specific number of acres undivided out of the survey.—Read v. Blaine, Tex., 201 S. W. 415.

39. **Divorce**—Alimony.—Decree for alimony is a decree not merely for payment of money, but for its payment in discharge of marital duty of maintenance, and is enforceable by attachment for contempt.—Smith v. Smith, W. Va., 95 S. E. 199.

40.——Increase of Alimony.—Amount ordered to be paid as temporary alimony may be increased to meet wife's need from changed circumstances because of necessary surgical operation with its expenses.—Rotge v. Rotge, Colo., 171 Pac. 360.

41.——Waiver.—A wife without means of support should not be held to waive her right to review a decree divorcing her from her husband and ordering her from his house by the forced acceptance of monthly allowances made in the decree, not appreciably larger than previous allowances pendente lite.—Spratt v. Spratt, Minn., 166 N. W. 769.

42. **Easements**—Irrevocable License.—General parol license by owner of dominant tenement to obstruct easement when executed by owner of servient tenement upon his own land becomes irrevocable.—Town of Brookline v. Loring, Mass., 118 N. E. 981.

43. **Electricity**—Public Service Company.—Corporation furnishing electricity to consumers for lights, etc., may enforce reasonable regulations, but cannot compel customers to release it from obligation when it may elect, but must, according to their needs and its facilities, equally serve those submitting to its rules.—Chambers v. Spruce Lighting Co., W. Va., 95 S. E. 192.

44. **Eminent Domain**—De Facto Officer.—Condemnation by a board of muncipal park commissioners created under an unconstitutional statute cannot, when questioned in ejectment, be upheld on the ground that they were de facto officers, whose acts were not subject to collateral attack.—Nichols v. City of Cleveland, U. S. C. C. A., 247 Fed. 731.

45.——Procedure.—Without adjudication and judgment of necessity to condemn, no subsequent proceeding can be had in condemnation proceedings, and judgment of necessity is final, subject only to review as provided by law.—State v. Superior Court for Grays Harbor County, Wash., 171 Pac. 238.

46. **Estoppel**—Change of Decision.—City held not entitled to base estoppel on expenditures made or action taken, based on rule of decision subsequently changed, where city took possession of land under invalid condemnation statute.—Nichols v. City of Cleveland, U. S. C. C. A., 247 Fed. 731.

47. **Exchange of Property**—Rescission.—If defendant or his agent, exchanging land for plaintiff's factory, took advantage of fact land was covered with snow when plaintiff inspected to mislead him, fact that had plaintiff been more diligent he would have discovered deception and saved himself from loss is no defense to defendant, sued for rescission.—Thuesen v. Johnson, Iowa, 166 N. W. 747.

48. **Executors and Administrators**—Breach of Contract.—Contract whereby son, in consideration of his parents' conveyance to him, bound "himself, his executors, and administrators and heirs" to support parents during their lives, was not breached by son's death, so as to allow parents to establish the present value of such support, based on mortality tables, as a claim against the son's estate under Rev. St. 1909, § 210, providing that when the demand is not due the court may adjust the same, etc.—Wilbur v. Wilbur, Mo., 201 S. W. 387.

49.——Injunction.—Where administrator is seeking to sell property as a part of estate of his intestate, adverse holders of land may maintain a suit for injunction; there being other facts alleged to show grounds of equitable jurisdiction.—Pickron v. Pickron, Ga., 95 S. E. 238.

50. **Fixtures**—Removability.—Smokehouse built by lessor for tenant with money furnished by tenant as incidental to tenant's packing house business, held a "trade fixture," removable as such.—Armour & Co. v. Block, Ga., 95 S. E. 228.

51. **Fraud**—Expression of Opinion.—If party expressing opinion possesses superior knowledge, his statement is actionable if he knows that he does not honestly entertain opinion because it is contrary to facts.—Como Orchard Land Co. v. Markham, Mont., 171 Pac. 274.

52. **Homestead**—Constitutional Law.—Under Const. Ark. 1868, art. 12, § 2, a sale under a deed of trust of land including the homestead conveyed no right in the homestead, either present or in remainder.—Hill v. Hill, U. S. C. C. A., 247 Fed. 778.

53. **Husband and Wife**—Entirety.—Where a judgment is entered against both husband and wife who hold land by entirety the property is subject to execution, but where the lien and judgment against the husband's interest becomes void because of his bankruptcy, levy on the property cannot be made during his life.—Ade v. Caplan, Mo., 103 Atl. 94.

54.——Joint Accounts.—Where a husband acted as agent for investment and management of property for a period of years, and he and his wife maintained joint accounts, wife received

benefit to her estate by settlement agreement of client who forebore to sue for accounting, or to follow joint property of husband and wife, and she was not in such case husband's surety.—McKay v. Corwine, Ind., 118 N. E. 978.

55. **Injunction**—Negative Covenant.—Court of equity will infer negative covenant in contract of employment, where equity and justice require; but such covenant, to be interfered with by injunction, must be clearly implied and understood by all parties, and should not be implied unless indispensable to carry out their intention.—Kennerly v. Simonds, U. S. D. C., 247 Fed. 822.

56.——Sureties on Bond.—Sureties on bond of administratrix, sued jointly with her on distributee's judgment obtained on citation against her, might show that the judgment was obtained by collusion and fraud, and that she had lawfully paid over distributee's share, or had lawfully expended it, so that there was no ground for restraining suit on the judgment.—Shipp v. McCowen, Ga., 95 S. E. 251.

57. **Insane Persons**—Attorney and Client.—Where an incompetent hires more attorneys than are reasonably necessary to fully protect his interest no recovery can be had for the excessive services, but a single allowance may be made and apportioned.—Fitzpatrick's Committee v. Dundon, Ky., 201 S. W. 339.

58. **Insurance**—Continuing Representation.—Stipulation in application for life insurance that policy shall not take effect until first premium is paid "during my insurability" was not continuing representation that applicant would remain in good health until application was accepted.—American Nat. Ins. Co. v. Brown, Ky., 201 S. W. 326.

59.——Estoppel.—Where the property owner, on learning that a fire policy was in her divorced husband's name, sent her agent to the insurer's agent, who advised her to get an assignment, but said that the policy was all right, the insurer was estopped to defend under clause of policy avoiding it if the insured's interest were other than as therein stated.—Mercer v. Germania Fire Ins. Co., Ore., 171 Pac. 412.

60.——Explosion.—Fire policy provision against liability from explosions, unless fire ensues, and in such event for fire damage only, does not exempt from liability for loss where fire preceded and proximately caused explosion.—Western Ins. Co. of Pittsburgh, Pa., v. Skass, Colo., 171 Pac. 358.

61.——Insolvency.—Where insurance commissioner has charge of insolvent insurance company he may bring one suit for benefit of creditors to collect all unpaid subscriptions to capital stock, and if properly brought in county or residence of some of defendants others of same class may be joined, although not residents.—McKey v. Wright, Ga., 95 S. E. 217.

62.——Proofs of Loss.—That plaintiffs in their proof of loss to defendant insurer had placed value of furniture before fire and amount of loss at higher figure than found by jury, would not, as a matter of law, show plaintiff's fraud or false swearing.—Royal Ins. Co. of Liverpool, England, v. Humphrey, Tex., 201 S. W. 426.

63. **Interest**—Computation.—In calculating interest on note in case of partial payments, interest should be calculated on demand to first payment, added to principal, and payment deducted, then interest should be cast on remainder to second payment, interest added, and second payment deducted, etc., unless interest up to any payment shall exceed it, when payment is to be deducted from interest, and excess interest carried forward without casting interest to next payment that will discharge excess.—Sutton v. Libby, Mo., 201 S. W. 615.

64. **Libel and Slander**—Injurious Publication.—In suit for publishing article stating that plaintiff had leprosy, that court modified defendant's requested instruction that "word 'obloquy' is defined as blame, reprehension" by adding "a clause of disgrace or reproach" constitutes no cause for complaint.—Lewis v. Hayes, Cal., 171 Pac. 293.

65. **Life Estates**—Remainderman.—Adverse possession as to an easement does not run against a remainderman until the death of the life tenant, where legal title to property burdened with easement was in trustee holding for life tenant's use, and remainderman derived title from power of appointment exercised by life tenant by will.—Greenbaum v. Harrison, Md., 103 Atl. 84.

66.——Rentals.—Where father and son leased land, it was competent for father's widow, to whom he devised life estate in all his property, instead of demanding possession, to permit lessee to continue in possession, in which case she would be entitled to rental which would have been her husband's had he survived.—In re Doore's Estate, Iowa, 166 N. W. 763.

67. **Malicious Mischief**—Criminal Law.—If reasonably prudent man would have deemed it necessary to drive automobile into dangerous place to escape more dangerous collision with driver of another car, driver of other car is criminally responsible for act which he rendered necessary.—State v. Abney, S. C., 95 S. E. 179.

68. **Mandamus**—Warrant Holder.—Where warrant of irrigation district is accepted in payment of its debt, warrant holder's remedy, if there are no funds to pay warrant and proper officers fail to certify necessary amount and make levy therefor, is exclusively by mandamus.—Rio Grande Junction Ry. Co. v. Orchard Mesa Irr. Dist., Colo., 171 Pac. 367.

69. **Master and Servant**—Agency.—A foreman, in full charge of the employes in a room, is an "agent," within Rev. St. c. 50, § 30, whose knowledge of an accident makes written notice by servant unnecessary.—In re Simmons, Me., 103 Atl. 68.

70.——Assumption of Risk.—Where plaintiff servant, having been ordered to carry wood, inspected it, thought it too heavy, and so told foreman, who replied that he needed it and to get it if plaintiff cared about his job, and servant tried to carry log, and thereby suffered hernia, he assumed the risk and could not recover.—Ehrenberger v. Chicago, R. I. & P. Ry. Co., Iowa, 166 N. W. 735.

71.——Federal Employers' Liability Act.—Where conductor, injured by rear-end collision when his train stopped, relied on rear brakeman to do his duty in back-flagging, negligence in this respect on brakeman's part would be chargeable to railroad company, and not conductor, under federal Employers' Liability Act.—Eley v. Chicago Great Western R. Co., Iowa, 166 N. W. 739.

72.——Ordinary Care.—Pedestrian is not bound to guard against another's negligence in operating his automobile, but has a right to presume that ordinary care will be used to protect him from injury.—Oelrich v. Kent, Pa., 103 Atl. 109.

73.——Protection of Employes.—Where an employer makes a rule for the protection of employes, he admits the reasonable necessity for the conduct thereby prescribed, and a violation of the rule can be found to be negligence, and the master cannot assert that the rule is not necessary.—Topore v. Boston & M. R. R., N. H., 103 Atl. 72.

74.——Res Ipsa Loquitur.—That section hand replacing old ties in defendant's railroad track stumbled over fence posts scattered along right of way and covered with grass did not show negligence of defendant.—Baker v. Lusk, Mo., 201 S. W. 357.

75.——Respondeat Superior.—Where telegraph operator, while off duty, was injured by defect in roadmaster's gasoline speeder on which he was journeying to nearby town to procure supplies, on roadmaster's invitation, company was not liable to him as employe.—Glover v. Chicago, M. & St. P. Ry. Co., Mont., 171 Pac. 278.

76.——Statutory Construction.—Industrial Commission's rule, and award based thereon, requiring employer to pay for medical services for two weeks after employe's disability occurs, is inconsistent with Rev. St. c. 50, § 10, requiring payment for medical services rendered during first two weeks after injury, where disability did not immediately develop.—In re McKenna, Me., 103 Atl. 69.

77. **Mechanics' Liens**—Default.—Subsequent default of building contractor who has become entitled to payment under his contract will not bar rights of a claimant who has secured lien on such earned payment by stop notice, though

contract permits owner to take over work and apply money not paid to contractor to expense of completion.—Moorestown Supply Co. v. Burns, N. J., 103 Atl. 83.

78. **Mortgages**—Mechanics' Lien.—Mortgage is entitled to priority over a mechanic's lien, though mortgage was not recorded until after work was begun, where contractor for building, claiming the lien, had knowledge that money was to be borrowed and mortgage given therefor.—Union Terminal Co. v. Turner Const. Co., U. S. C. C. A., 247 Fed. 727.

79. **Municipal Corporations**—Bond of Officer. —Bond of city treasurer providing that surety shall make good any loss sustained by city by any act of treasurer amounting to larceny, was sufficient; it not being necessary to detail in bond treasurer's duties.—City of Seaside v. Oregon Surety & Casualty Co., Ore., 171 Pac. 396.

80.——Contributory Negligence. — Plaintiff's failure to take any precaution to protect his premises, after knowledge that sewer main was of insufficient capacity, constituted contributory negligence barring recovery against defendant city for damages due to sewer water backing up into plaintiff's basement.—Hume v. City of Chilton, Wis., 166 N. W. 776.

81.——Governmental Powers.—Town has no right in governmental capacity to land occupied by street, but it has rights as municipal corporation owning land abutting on street.—Town of Brookline v. Loring, Mass., 118 N. E. 981.

82.——Independent Contractor.—Municipality was not liable for death caused by fall of a smokestack being erected under contract, where such erection was not necessarily dangerous when done with care by persons having skill, and the municipality did not know the contractor was incompetent and did not control the methods or appliances of the contractor in performing the work.—Cash v. Casey-Hedges Co., Tenn., 201 S. W. 347.

83.—Presumption.—Where plaintiff proves that the vehicle which caused his injury belonged to defendant, he makes a prima facie case, since the jury may infer that the driver was defendant's servant, and that the vehicle was being used for defendant's purposes.—West v. Kern, Ore., 171 Pac. 413.

84. **Negligence**—Licensee.—The implied invitation of a storekeeper is broad enough to include one who enters a general store with a vague purpose of buying if she sees anything that she wishes.—MacDonough v. F. W. Woolworth Co., N. J., 103 Atl. 74.

85. **Payment**—Presumption.—Where defendant agreed to deliver corn to plaintiffs, and executed receipts for advancements, and he delivered corn, it should be presumed that corn received was applied to receipts, and, when their amount in value had been delivered, plaintiffs could not recover attorney's fees as provided in the receipts.—Born v. Union Elevator Co., Ind., 118 N. E. 973.

86. **Physicians and Surgeons**—Negligence.—Where negligence charged was improper reduction of fracture, and use of improper appliances to keep fracture in position, act of defendant in his treatment of injury, not involving such charges of negligence, afforded no basis for recovery.—O'Grady v. Cadwallader, Iowa, 166 N. W. 755.

87. **Principal and Agent**—Change of Employment.—Where an automobile salesman was discharged, his going to work immediately on a farm did not as a mater of law forfeit his right to damages, since he was not bound to secure the master's consent to change his work, though the master could show what he could have earned had he secured employment of the same general nature as selling automobiles, if it was reasonably possible to secure such employment.—Bertholf v. Fisk, Iowa, 166 N. W. 713.

88. **Sales**—Countermanding Order. — Where buyer countermanded order several months prior to delivery of goods to carrier, and notified seller that he would not accept goods, seller's remedy was by a suit for breach of contract, or under Civ. Code 1910, § 4131.—Blackstock, Hale & Morgan v. Phillips-Jones Co., Ga., 95 S. E. 265.

89. **Specific Performance**—Mutuality.—Where contract between publisher and author merely gave publisher option to acquire author's later work, and did not bind publisher to purchase it, option contract cannot be enforced, as negative covenant in contract of employment, because not mutual.—Kennerley v. Simonds, U. S. D. C., 247 Fed. 822.

90. **Stipulations**—Breach of.—Agreement between buyer and sellers of standing timber, each claiming title to land, made pending suit between them to determine title, requiring deposit of contract price with stakeholder, contemplated right of appeal, and buyer's withdrawal of fund after trial decision before right of appeal expired was a breach making him liable for damages.—Halstead v. New River Colleries Co., W. Va., 95 S. E. 208.

91. **Street Railroads**—Acquiescence.—That a borough made no effort for 12 years to question a street railway's right to occupy a highway formerly in a township from which borough had been set off was strong evidence of its acquiescence in street railway's claim to rightful occupation of the highway.—Pittsburgh Rys. Co. v. Borough of Carrick, Pa., 103 Atl. 106.

92.——Negligence.—Evidence that plaintiff who intended to enter rear door of the pay-as-you-enter street car was injured by opening of front door while passing by it, etc., held not to establish street railroad's negligence.—Murray v. Cumberland County Power & Light Co., Me., 103 Atl. 66.

93. **Trusts**—Implied Trust.—Where agent in violation of his trust uses money of his principal, law implies trust in favor of principal, and to enforce it equity will subject property purchased to claims of principal, as against either volunteer or fraudulent grantee.—McKay v. Corwine, Ind., 118 N. E. 978.

94.——Resulting Trust.—Where a husband acting as agent for his wife exchanged land belonging to her for another tract, thereby purchasing for her the land received in exchange, but took title in himself, the wife on discovering it was entitled to have a resulting trust declared. —Pickron v. Pickron, Ga., 95 S. E. 238.

95. **Wills**—Contest.—Where one contesting will had at one time been in charge of estate of testator, checks drawn by contestant were admissible as bearing on whether contestant had defrauded testator, and thus tending to rebut presumption of undue influence on part of proponent.—Monahan v. Roderick, Iowa, 166 N. W. 725.

96.——Lunacy.—The finding of a lunacy commission as to testator's mental state three weeks before his death and covering a period during which the will was made is only prima facie evidence of facts found, and is not conclusive.— In re Coleman's Will, N. J., 103 Atl. 78.

97.——Statutory Construction.—Civ. Code 1910, § 3851, providing that no one leaving a wife or child or descendants of a child shall devise over one-third of his estate to any charitable institution, prohibits a testator's exclusion of such persons, which prohibition is not made in the public interest, but only to prevent what the statute regards as a private wrong.—Monahan v. O'Byrne, Ga., 95 S. E. 210.

98.——Testamentary Capacity. — Where the beneficiary under a prior will contested the proposed will for alleged lack of testamentary capacity, she could not succeed by showing that testator was always foolish and simple, but only by showing that incapacity arose between the making of the two wills.—Touhey v. Cooney, Iowa, 166 N. W. 684.

99.——Spendthrift Trust.—Will devising a residue to three children, share and share alike, with right of survivorship, and putting share of a son into hands of executor as trustee to pay income, with remainder to his heirs, created a spendthrift trust, so that trust property could not be reached by creditors of cestui que trust. —Everitt v. Haskins, Kan., 171 Pac. 632.

100. **Workmen's Compensation Act**—Casual Employe.—Under Workmen's Compensation Insurance, and Safety Act, § 14, a carpenter employed to erect a dwelling house, who worked for over three months at day wages, was not a casual employe.—Armstrong v. Industrial Accident Commission of State of California, Cal., 171 Pac. 321.